

**The Maryland Home
Improvement Commission**

**v. Kraig Rebstock
t/a KER Remodeling
(Contractor)
and the Claim of
Edwin & Patricia Beachy
(Claimant)**

* **BEFORE THE**
* **MARYLAND HOME IMPROVEMENT**
* **COMMISSION**
*
* **MHIC No.: 11 (90) 971**
*
*

FINAL ORDER

**WHEREFORE, this 26th day of October 2015, Panel B of the Maryland Home
Improvement Commission ORDERS that:**

- 1. The Findings of Fact set forth in the Proposed Order dated June 5, 2015 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated June 5, 2015 are AFFIRMED.**
- 3. The Proposed Order dated June 5, 2015 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date.**
- 5. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
**Joseph Tunney, Chairperson
PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

PHONE: 410-230-6309 • FAX: 410-962-8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
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IN THE MATTER OF THE CLAIM	*	BEFORE JENNIFER M. CARTER JONES,
OF EDWARD BEACHY,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	*	OF THE MARYLAND OFFICE
AGAINST THE	*	OF ADMINISTRATIVE HEARINGS
MARYLAND HOME	*	OAH NO.: DLR-HIC-02-14-37099
IMPROVEMENT GUARANTY FUND	*	MHIC NO.: 11 (90) 971
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF	*	
KRAIG REBSTOCK,	*	
T/A KER REMODELING,	*	
RESPONDENT	*	

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about October 23, 2012, Edward Beachy (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$20,000.00 for actual losses suffered as a result of home improvement work performed by Kraig Rebstock, t/a KER Remodeling (Respondent).

I held a hearing on February 5, 2015, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 and Supp. 2014).

The Claimant and the Respondent represented themselves. Eric B. London, Assistant Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

- Fund #1 OAH Notice of Hearing, dated October 30, 2014
- Fund #2 DLLR Hearing Order, dated September 9, 2014
- Fund #3 Licensing History for the Respondent as of January 7, 2015
- Fund #4 Home Improvement Claim Form, received on July 16, 2014
- Fund #5 HIC Case History, printed on January 7, 2015

I admitted the following exhibits on behalf of the Claimant:

- Cl. #1 Contract, dated October 23, 2010
- Cl. #2 Inspection Report, completed by Maryland Home Inspector John Heyn, dated April 19, 2011, with attached photographs, dated April 14, 2011
- Cl. #3 Inspection Report, completed by John Heyn, dated June 23, 2011, with attached photographs, dated June 20, 2011
- Cl. #4 Set of photographs taken by the Claimant on or about June 23, 2011

The Respondent did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified on his own behalf and did not present the testimony of any other witnesses.

The Respondent presented the testimony of Bill Marshi, a home improvement contractor, who was accepted as an expert in the field of home improvement. He did not present any other witnesses.

The Fund presented the testimony of the Respondent.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Claimant owned 7725 West Shore Road (the property).
2. On or about October 23, 2010, the Respondent contracted with the Claimant to complete an addition to the Claimant's property. The contract specified that the Respondent would complete the following:
 - Dismantle by tearing down existing rear room of the main dwelling and remove debris;
 - Design and build a 10' x 28' two-story addition, project to include new footer slab, building frame, new roof and outside guttering on newly constructed building;
 - Entire dwelling including newly constructed addition will be sided and insulated with Fanfold;
 - Newly constructed addition will include the design of an upstairs master bedroom with walk-in closet. Downstairs of new addition to be designed as recreational/family room, with hardwood flooring installed. Design downstairs also to include bathroom and

laundry room, with the installation of ceramic tile flooring. Baseboard and trim included.

Plumbing services are in accordance with county code;

- HVAC with a heat pump commensurate with square feet;
 - Electrical services are in accordance with county codes. Necessary upgrades will be rated at "labor only" additional cost;
 - Ten windows to be installed on newly constructed addition - five windows on the first floor and five windows installed on the second floor;
 - Two windows installed on original dwelling; and,
 - All materials for this project will be contractor's grade. Any additional upgrades or special orders not specified will be at the owner's expense.
3. The Claimant agreed to pay the Respondent \$61,500.00 to complete the addition to the property.
 4. The Claimant and the Respondent agreed that the Claimant would pay the Respondent an additional \$1,100.00 for the installation of a shower and for a porch roof, which made the total amount of the contract \$62,600.00.
 5. The Respondent completed the addition to the property in or about February 2011.
 6. The Claimant paid the Respondent \$57,600.00.
 7. John M. Heyn, a Maryland Home Inspector, inspected the Claimant's property on April 19, 2011.
 8. The Respondent returned to the Claimant's property in June 2011 and attempted to make repairs to the siding, the floor and the windows.
 9. The Respondent did not complete any additional work on the property after June 2011.
 10. On or about June 20, 2011, John Heyn conducted another inspection of the property.

11. As of June 20, 2011, the vinyl siding the Respondent installed displayed the following problems:
 - There was a gap in the corner trim where it met the roof;
 - A portion of the corner trim was wavy;
 - Approximately twenty percent of the siding did not have Fanfold insulation, designed to protect the property from water damage;
 - Siding joint seams were visible in some areas;
 - There were gaps between siding panels;
 - The corner siding channel was hanging loose;
 - Gaps in the siding existed where the air conditioner entered the house;
 - A piece of siding had come loose under a window; and a piece of siding had torn; and,
 - A piece of siding had blown off of the rear gable.
12. No water has penetrated the house as a result of the Respondent's installation of the siding.
13. The portion of the addition that did not have Fanfold insulation under the siding included the rear gable.
14. Contractors do not typically install Fanfold insulation underneath gable siding so the house can breathe.
15. As of the hearing date, the Claimant had not replaced the piece of siding that blew off of the rear gable.
16. As of June 20, 2011, the hardwood floor the Respondent installed the living room had some uneven seams and several of the boards popped when walked upon.

17. As of June 20, 2011, two of the Claimant's windows did not have the same trim width on the sides. One side of the windows had one-fourth-inch trim and the other side had trim that was 1-inch wide.
18. As of June 20, 2011, the bedroom walls were not completely level.

DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2014). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). A claim may be denied if "the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2014).

The Claimant has the burden of proof at a hearing to establish entitlement to recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2014).

The Claimant asserts that he paid the Respondent \$57,600.00 for the addition to his property. The Claimant also asserts that the Respondent performed unworkmanlike home improvements related to the installation of the siding, windows, walls, and the wood floor in the living room. Particularly, the Claimant argues that the Respondent installed the vinyl siding in such a way that it left gaps in the siding where water could potentially penetrate and cause damage to the walls beneath, and he failed to install Fanfold insulation under approximately twenty percent of the siding in violation of the contract, including under the gable siding, where there was no Fanfold insulation at all.

The Claimant also asserted that the Respondent installed two windows on the second floor of the addition with uneven trim; installed his bedroom walls unevenly; and that he

improperly installed the hardwood floor in the living room too tight, causing it to pop in certain areas when stepped upon. In support of his claim the Claimant submitted photographs he took of the property before June 2011, and two reports completed by Maryland Housing Inspector, John Heyn, with attached photographs. The Claimant asserts that he is entitled to reimbursement from the Fund in the amount of \$20,000.00 because it will cost him at least \$25,000.00 to make the repairs necessitated by the Respondent's unworkmanlike home improvement work.

The Respondent argues that he completed the work to the property in a workmanlike fashion. Particularly, the Respondent asserts that after he completed the work to the property, he returned and made repairs when the Claimant complained about the state of the siding, the windows, and the hardwood floors. The Respondent additionally asserts that the Claimant did not pay him the \$61,000.00 they agreed upon for the addition to the property and that any lingering repairs to the property would not cost \$25,000.00. In support of his position, the Respondent presented the testimony of Bill Marshi, a home improvement contractor, who was accepted as an expert in the field of home improvement.

I shall address each of the bases for the Claimant's claim for reimbursement in turn.

WOOD FLOORS

The Claimant asserted that the Respondent improperly installed the floating wood floor in the living room by fitting the boards too tightly. In his June 23, 2011 inspection report, Inspector Heyn stated that the hardwood floor had uneven seams and made popping noises and "may need to be done over."

The Respondent testified that he properly installed the wood floors and that the Claimant never complained to him about the hardwood floors. The Respondent's expert witness, Mr. Marshi, testified that it is typical for hard wood floors to squeak or pop after they have been

installed and that sometimes, gaps appear in the floor due to moisture. According to Mr. Marshi, the gaps could be remedied by running a dehumidifier in the room.

After considering the evidence, I find that the Claimant has not met his burden to prove that the Respondent installed the wood floor in an unworkmanlike fashion. Other than his testimony that the floors pop, the Claimant submitted only Mr. Heyn's June 23, 2011 report confirming the popping sound of the floor and positing that the floor "may need to be done over." Mr. Heyn did not offer any details to support his non-definitive statement regarding the floor. Accordingly, the Claimant has failed to provide sufficient evidence that the wood floor must be replaced or that the installation was otherwise unworkmanlike.

This is particularly so in light of Mr. Marshi's testimony that it is typical for wood floors to make noise after they are installed, and that any gaps in the floor could be remedied with a dehumidifier. Furthermore, the Claimant did not offer any evidence of the cost to replace the floor or remedy the problems with the floor. Accordingly, I have no means by which to assign any actual loss to the Claimant for the purportedly unworkmanlike installation of the floor.

WINDOWS

According to the Claimant, the Respondent installed the windows in the bedroom in an uneven fashion, using one-inch trim on one side of the windows and one-fourth-inch trim on the other side of the windows, making them appear non-uniform. The Claimant presented photographs provided by Mr. Heyn as part of his June 2011 inspection report showing windows with trims of different widths in support of his claim.

Mr. Marshi testified that although the width of the window trims is different, it does not constitute a material defect. To the contrary, Mr. Marshi testified that the differing trim size is a cosmetic defect.

I agree with Mr. Marshi. When first examining the photographs of the windows, I, as a layperson, could not discern any defect. Only when the Claimant pointed out the different trim widths did I understand the basis for his claim. Based upon the evidence presented, I am unable to find that the installation of windows with differing trim widths constitutes unworkmanlike home improvement. Furthermore, the Claimant offered no measure of the specific cost to repair the windows that were unevenly installed. Accordingly, the Claimant has not proven the measure of any actual loss he experienced as a result of the Respondent's purportedly unworkmanlike installation of the windows.

SIDING

The Claimant's primary complaint is that the Respondent installed the siding in an unworkmanlike fashion. According to the evidence produced by the Claimant, there are areas where the siding the Claimant installed show gaps, and there was at least one piece of siding that was cracked. Furthermore, the Claimant asserts that the Respondent failed to install Fanfold insulation under approximately twenty percent of the house, which leaves the home vulnerable to water damage. Because the contract dictated that the Respondent would install Fanfold insulation under the siding installed on the entire home, the Claimant asserts that the Respondent's work was incomplete or unworkmanlike. Additionally, a piece of siding had fallen loose under a second floor rear window and a large piece of siding blew off of the gable, which the Claimant has not replaced. The missing gable siding has allowed moisture to enter the home.

Pointing to Mr. Heyn's April 2011 report in which he opined that a contractor would feel compelled to remove the siding installed by the Respondent and replace it, at a cost of between \$10,000.00 and \$15,000.00, the Claimant asserts that he is entitled to reimbursement from the Fund. The Claimant did not present any estimates provided by another contractor outlining the cost to remove and replace the siding installed by the Respondent.

The Respondent testified that when the Claimant complained about the lack of Fanfold insulation under some of the siding, he returned to the property in June 2011, checked under the siding every three-to-four feet, and installed the Fanfold insulation where it was missing. The Respondent acknowledged that he did not install the Fanfold insulation under the gable siding, but testified that industry standards dictate that contractors omit the Fanfold under the gable siding to allow the attic airflow to prevent the formation of mold.

Mr. Marshi's testimony was similar to the Respondent's. After reviewing the photographs presented by the Claimant, showing gaps in the siding, Mr. Marshi acknowledged that such gaps are unacceptable. The gaps, however, could be easily remedied. According to Mr. Marshi, the siding is loosely nailed to the house at the edge with a space to allow for expansion. It is fairly simple to remove the nail from the piece at issue, slide it over to fill the gap, and refasten it to the wall. Mr. Marshi testified that the cost to make these repairs would be approximately \$75.00 for the labor.

Mr. Marshi also testified that it is common for a piece of siding to come loose from a gable – particularly in a strong storm. Similar to the Respondent, Mr. Marshi testified that contractors typically do not install Fanfold insulation under the gable to allow sufficient air to flow in the attic and prevent the formation of mold. Mr. Marshi testified, however, that Fanfold insulation *should* be installed under other areas of siding and conceded that a failure to install it would constitute a material error. Similar to his testimony about the gaps in the siding, however, Mr. Marshi challenged the contention that the siding must be completely removed to remedy the lack of Fanfold insulation. Rather, he opined that the siding in the areas missing the insulation could be easily popped up, the insulation installed, and the siding refastened. The total cost for this procedure would be approximately \$1,800.00. Similarly, Mr. Marshi testified that to install the missing Fanfold insulation under the second floor rear window would cost approximately

\$200.00 Mr. Marshi also testified that there is no set way to install siding and visible seams are not an indication of improper installation. Mr. Marshi added that the installation of the corner channel was appropriate, because the channel sits away from the house and would not allow water to penetrate the house regardless of whether the top portion of the channel funneled into the bottom portion or vice versa.

Mr. Marshi conceded that the gaps under the windows and around the air conditioning unit were inappropriate, but testified that those gaps could be remedied with caulk or weather stripping. Finally, Mr. Marshi testified that there was no way to tell whether the small crack in a piece of the siding was there when the Respondent installed the siding or whether it had been hit by a rock.

Ultimately, Mr. Marshi testified that the problems the Claimant had with the siding could be fixed for approximately \$2,120.00, far less than the \$10,000.00 - \$15,000.00 Mr. Heyn stated it would cost to remove and replace all of the siding.

I found Mr. Marshi's testimony compelling. Although he is a friend of the Respondent's, he testified that he was neither biased toward the Respondent, nor being paid for his testimony. I found that testimony credible because although he found the Respondent's work to be generally workmanlike, when he reviewed the Claimant's photographic evidence of the gaps in the siding and the missing Fanfold insulation, he testified against the Respondent's interest, offering the opinion that those conditions constituted material errors that should be remedied. Such testimony against the Respondent's interest lends credibility to Mr. Marshi's general testimony and opinion about the condition of the work completed by the Respondent.

Furthermore, Mr. Marshi gave a detailed and cogent explanation of why the repairs to the siding could be made without removing all of the existing siding and replacing it, and exactly how much simpler repairs could be accomplished.

By contrast, in his reports, other than stating that another contractor would want to remove all of the siding installed by the Respondent and install new siding, Mr. Heyn offered no explanation or detail regarding the basis of that opinion. The Claimant did not call Mr. Heyn to testify, and therefore, there was no way to develop a basis for his opinion. As I have stated, the Claimant bears the burden to prove both that the Respondent's home improvements were unworkmanlike and the amount of his actual loss. The unsubstantiated nature of Mr. Heyn's report is insufficient to meet the Claimant's burden in light of Mr. Marshi's credible and clear testimony. Accordingly, I find that the evidence supports the conclusion that the amount the Claimant could be expected to pay to remedy the Respondent's improper installation of the siding is \$2,120.00.¹

MEASURE OF AWARD

It has been established that the Claimant would conceivably have to pay \$2,120.00 to remedy the Respondent's unworkmanlike installation of the siding. MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

¹ The Claimant initially testified that the Respondent installed the bedroom walls unevenly. When, however, he clarified the home improvement work he found to be unworkmanlike for which he sought compensation from the Fund, he did not include the bedroom walls or provide any evidence of the cost to remedy any issues with the walls.

The total price for the original contract (\$61,500.00) plus the change orders (\$1,100.00) is \$62,600.00.

The Claimant submitted evidence that the Respondent received \$57,600.00 in payment for the work he performed.

As I have stated, the reasonable amounts the Claimant has proven he will have to pay to remedy the Respondent's unworkmanlike or incomplete home improvements is \$2,120.00.

Applying the appropriate formula for measuring the Claimant's actual loss yields the following:

Amount paid to the Respondent	\$57,600.00
Reasonable amount paid to complete	<u>+\$ 2,120.00</u>
	\$59,720.00
Original contract price (inclusive of change order)	<u>-\$62,600.00</u>
	-\$ 2,880.00

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not established that he is entitled to reimbursement from the Fund because he did not incur an actual loss as a result of the Respondent's unworkmanlike or incomplete home improvement work. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(d) and 8-407(e)(1) (2010 & Supp. 2014).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guarantee Fund deny the Claimant's claim; and

ORDER that the records and publications of the Maryland Home Improvement
Commission reflect this decision.

Signature on File

May 5, 2015
Date Decision Issued

Jemmer M. Carter Jones
Administrative Law Judge

JCJ/emh
#155925

PROPOSED ORDER

WHEREFORE, this 5th day of June, 2015, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

THE HISTORY OF THE

CHAPTER I

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